

1 UNITED STATES COURT OF APPEALS

2 FOR THE SECOND CIRCUIT

3 August Term, 2002

4 (Argued: September 26, 2002
5 Question Certified to the New York Court
6 of Appeals: December 30, 2002 Decided: November 18, 2003)

7 Docket No. 02-7212

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9 NORBERTO PRATS and SELENE PRATS,

10 Plaintiffs-Appellants,

11 - v. -

12 THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY,

13 Defendant-Appellee.

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15 Before: MESKILL, SACK, and KATZMANN, Circuit Judges.

16 Resolution of issue certified to the New York Court of
17 Appeals on whether the conduct at issue in this action,
18 inspections of construction work, fell within the purview of New
19 York Labor Law § 240(1).

20 Reversed and remanded.

21 ARNOLD E. DIJOSEPH, III, DiJoseph &
22 Portegello, P.C., New York, NY, for
23 Plaintiffs-Appellants.

24 RICHARD LERNER, Wilson, Elser,
25 Moskowitz, Edelman & Dicker LLP (Helmut
26 Beron, Jeffrey Ettenger, of counsel),
27 New York, NY, for Defendant-Appellee.

28 PER CURIAM:

1 The United States District Court for the Southern
2 District of New York (Denny Chin, Judge) granted in part the
3 motion of the defendant-appellee The Port Authority of New York
4 and New Jersey for partial summary judgment pursuant to Fed. R.
5 Civ. P. 56 and dismissed the claims of the plaintiffs-appellants
6 Norberto Prats and Selene Prats under New York Labor Law
7 §§ 240(1) and 241(6). The plaintiffs appealed only the district
8 court's ruling on section 240(1), contending that the it erred in
9 concluding that the work that Norberto Prats was performing at
10 the time of his injury -- inspecting air conditioning units -- is
11 not protected by New York Labor Law § 240(1). New York Labor Law
12 § 240(1) reads, in pertinent part:

13 All contractors and owners and their
14 agents . . . in the erection, demolition,
15 repairing, altering, painting, cleaning or
16 pointing of a building or structure shall
17 furnish or erect, or cause to be furnished or
18 erected for the performance of such labor,
19 scaffolding, hoists, stays, ladders, slings,
20 hangers, blocks, pulleys, braces, irons,
21 ropes, and other devices which shall be so
22 constructed, placed and operated as to give
23 proper protection to a person so employed.

24 N.Y. Lab. Law § 240(1). On December 30, 2002, we certified the
25 following question to the New York Court of Appeals:

26 In what circumstances, if any, are workers
27 engaged in inspections of construction work
28 that are part of an overall construction
29 project protected by New York Labor Law
30 § 240(1)?

1 Prats v. Port Auth. of New York & New Jersey, 315 F.3d 146, 151
2 (2d Cir. 2002). We said that "[t]he certified question may be
3 deemed expanded to cover any pertinent further issue that the
4 Court of Appeals thinks it appropriate to address." Id. On
5 January 21, 2003, the Court of Appeals accepted the
6 certification. Prats v. Port Auth. of New York & New Jersey, 99
7 N.Y.2d 578, 785 N.E.2d 732, 755 N.Y.S.2d 710 (2003).

8 On October 21, 2003, the Court of Appeals answered the
9 following question in the affirmative:

10 [W]hether the conduct at issue in this
11 action, inspections of construction work,
12 fell within the purview of New York Labor Law
13 § 240 (1).

14 Prats v. Port Auth. of New York & New Jersey, No. 103, 2003 WL
15 22387602, 2003 N.Y. LEXIS 3312, at *3, 2003 N.Y. Slip Op. 17547,
16 at 3 (N.Y. Oct. 21, 2003) (internal quotation marks omitted).

17 The Court of Appeals reasoned that "a confluence of factors
18 brings plaintiff's activity within the statute: his position as
19 a mechanic who routinely undertook an enumerated activity, his
20 employment with a company engaged under a contract to carry out
21 an enumerated activity, and his participation in an enumerated
22 activity during the specific project and at the same site where
23 the injury occurred." Id., 2003 WL 22387602, 2003 N.Y. LEXIS
24 3312, at *8-*9, 2003 N.Y. Slip Op. 17547, at 7.

25 The plaintiffs argue that they are entitled to summary
26 judgment on their claim under section 240(1). But the plaintiffs

1 did not move for summary judgment in the district court on their
2 section 240(1) claim. As a general rule, "a federal appellate
3 court does not consider an issue not passed upon" by the district
4 court. SEC v. Monarch Funding Corp., 192 F.3d 295, 308 (2d Cir.
5 1999). The question whether the Port Authority is liable to the
6 plaintiffs for damages under section 240(1) is different from the
7 question addressed on certification and answered by the New York
8 Court of Appeals, whether the work Norberto Prats did at the time
9 of his injury falls "within the purview" of section 240(1).
10 While the district court decided the latter question (albeit
11 wrongly, according to the New York Court of Appeals), it did not
12 decide the former. We therefore remand for the district court to
13 decide the Port Authority's liability to the plaintiffs in the
14 first instance.

15 Accordingly, we reverse the district court's grant of
16 the Port Authority's motion for partial summary judgment as to
17 the Prats' section 240(1) claim and remand the case for further
18 proceedings.